No. 01-951

Supreme Court, U.S.
FILED
FEB 4 2002
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In The

Supreme Court of the United States

PHILLIP D. FORNER, F&B DEVELOPMENT, L.L.C., and ALLENDALE HEATING CO., INC., a Michigan corporation,

Petitioners,

v.

ALLENDALE CHARTER TOWNSHIP, a subdivision of the State of Michigan,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Did the trial court make erroneous factual findings or misapply properly stated rules of law when it determined that the Township's zoning ordinance did not effectuate an unconstitutional taking of the Plaintiffs' property?

2. Did the trial court make erroneous factual findings or misapply properly stated rules of law when it determined that the Plaintiffs were not denied procedural due process?

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[1] Respondent objects to the Petitioners' "Questions Presented for Review" for the reason that they unfairly incorporate argumentive and erroneous facts contrary to Rule 14 of the Rules of the Supreme Court of the United States.

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ALLENDALE CHARTER TOWNSHIP ZONING ORDINANCE

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STATEMENT OF THE CASE

This is a zoning case in which the Plaintiffs challenge the constitutionality of the Township's agricultural zoning of their 28-acre farm. Specifically, the Plaintiffs would like to develop 52 residential lots on 25.25 acres of this farm, whereas the Township's zoning ordinance, as modified by a variance, would allow them to develop up to 28 lots, a difference of 24 lots.

The Plaintiffs collectively own 37.62 acres of contiguous property in Allendale Township. This property expands over three separate zoned districts identified in the Township's zoning ordinance. The property located north of a quarter section line, consisting of approximately 28 acres, is a farm purchased by the Plaintiff, Phillip Forner, in May 1989 for $128,000. (R II pp. 449-452; R III p. 558). (References are to the trial transcript).[2]

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[2]

R I = 02-12-97 Trial's First Day, pp 2-254
R II = 02-13-97 Trial's Second Day, pp 254-503
R III = 02-14-97 Trial's Third Day, pp 503-782
R IV = 02-25-97 Trial's Fourth Day, pp 1-174
R V = 02-26-97 Trial's Fifth Day, pp 175-248,
R V-A = 02-26-97 Excerpt containing Boelkin's testimony that follows p 234 of R V and that is separately paginated 2-86
R V-B = 02-26-97 Excerpt containing Brummel's testimony that follows p 424 of R V and that is separately paginated 1-25
R VI = 03-07-97 Trial's Sixth Day, pp 2-285

Located on this farm property are two residential houses, a large pole barn, a veal calf barn, other structures and a parcel donated to Love, Inc. (R III pp. 562-565). This area is identified as "B" and "C" on the map attached to the trial court's Opinion. (Pet., App. at 44a). The remainder of this farm (marked as parcel "D" on this map) is approximately 25.25 acres. (Pet., App. at 44a). The only property involved in this litigation is this 25.25-acre portion of this farm.[3]

This entire farm property has long been zoned in the "AG Agricultural and Rural District" (AG) under the Township's zoning ordinance. Likewise, all of the properties surrounding the Plaintiffs' farm on the west, north and east sides are zoned within, and are being used in compliance with, the AG District.[4]

Immediately adjacent and contiguous to the east bounty line of the Plaintiffs' farm is a large, intensive and active turkey farm which processes approximately 200,000 turkeys a year. (R III pp. 707-708). In addition to several large structures (including "brooder" barns, a

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[3] The Plaintiffs did not need, request or obtain any variance relief from the Zoning Ordinance provisions applicable to their adjacent property located in the C-3 Commercial District or their property located in the R-1 Residential District. Further, the Plaintiffs do not assert any "as applied" constitutional challenges to the Township's zoning of their C-3 or R-1 zoned property. Consequently, the Township's zoning of this adjacent property is not at issue or being contested in this case.

[4] The quarter section line that runs along the south boundary of the Plaintiffs' farm has historically separated the AG zoned property on the north from the R-1 residential zoned property to the south in this section of the Township.

manure recycling building, large grain bins, and large noisy grain dryers), this turkey farm utilizes several large pieces of equipment, including transportation vehicles, semi-tractors, bulldozers, and farm equipment. (R III pp. 702-713). In addition, the fields on this farm, which run right up to the Plaintiffs' east boundary line, are used to plant, grow and harvest crops, as well as for the spreading of large quantities of turkey manure. Various chemicals are also sprayed on these fields by sprayers and airplanes. (R III pp. 724, 732-733). To protect the turkeys, the owner has implemented a "strict bio-security system," which precludes anyone (including employees) from entering the turkey barns (or going from one barn to the other) without first taking a shower, changing clothes, and using iodine disinfectant to wash their shoes. Further, the employees are not permitted to own any pets such as dogs, parakeets, or parrots. If a neighbor boy, for example, out of curiosity were to enter one of the barns without complying with this bio-security system, it could be "disastrous," with the loss of approximately $125,000 worth of turkeys in just one barn. (R III pp. 714-715, 771). As determined by the trial judge, based upon the evidence submitted during the trial, a residential development at the threshold of this farm would be incompatible with this high intensity agricultural land use, resulting in many serious conflicts and problems. (Pet., App. at 37a-38a).

The Township's zoning ordinance permits several uses as a matter of right within an AG District. These permitted uses include various general and specialized farming and agricultural activities. (Pet., App. at

133a-134a). In addition, single family residences are permitted in an AG District as long as the lot area is not less than one acre and the width of the lot at the front building line is not less than 150 feet. (Pet., App. at 134a, 136a).

After deducting the area that would be required for roads, the Plaintiffs could develop this 25.25-acre section of their farm into 20 lots under the zoning ordinance restrictions. (R IV p. 153; R V-B pp. 19-20). The Plaintiffs, however, wanted to increase the number and density of the houses on their AG property by building more and smaller lots than permitted in an AG District. Therefore, during the pendency of this litigation, they filed an application with the Township Zoning Board of Appeals (ZBA) for variances from the applicable area, frontage and density requirements.[5]

In response, the ZBA substantially (but not completely) granted the Plaintiffs' variance application at the conclusion of the public hearing on February 3, 1997. The granted variances include:

1. Reducing the minimum lot area from 1-acre to 10,000 square feet (12,500 square feet for corner lots).

2. Reducing the minimum lot frontage width from 150 feet to 80 feet (100 feet for corner lots).

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[5] The Plaintiffs were also required to apply for such variances before their constitutional claims would be ripe for adjudication. *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 at 2459 (2001); *Paragon Properties v. Novi*, 452 Mich. 568 (1996).

3. Increasing the maximum number of permitted dwellings on the Plaintiffs' AG property from 20 to 28.

These variances were made subject to **only** the following conditions:

1. The maintenance of a defined buffer space on the east side of the property to help separate their residential development from the adjacent conflicting intensive agricultural land use.

2. The construction and maintenance of an earthen berm four feet in height along the eastern boundary line to help separate their residential development from the adjacent conflicting intensive agricultural land use.

3. The inclusion of a disclosure statement in the deeds conveying the lots in the development.

4. Instead of being made permanent, the above conditions contained, for the benefits of the Plaintiffs, a sunset provision which provided for their elimination when the conflicting land use on the east side of the property ceased to exist for a period of one year – similar to the one year limitation provision in Section 26.03 of the Zoning Ordinance for the discontinuance of a non-conforming use. (Pet., App. at 57a-60a).

In short, the variance permitted the Plaintiffs to build smaller lots, and increase the number of permitted lots from 20 to 28, in exchange for complying with certain mitigating conditions, including the maintenance of a buffer zone to help reduce the resulting conflicts that

would otherwise occur between these incompatible land uses.[6]

This variance simply gave the Plaintiffs some additional flexibility and options in the use of their property. If they chose, the Plaintiffs could still use or develop the property as zoned without using the benefit of the conditional variance. Therefore, the variance did not take any prior rights or uses away from them.

At the conclusion of an extensive trial, the trial court made certain factual findings and concluded that the Township's zoning ordinance, as applied to the Plaintiffs' property, is constitutional in that it advances legitimate governmental interests, is reasonable, and does not effectuate any unlawful taking. (Pet., App. at 33a). In addition, the trial court on appeal affirmed the ZBA variance decision upon determining that it complied with the constitution and laws of the state, was based upon proper procedure, was supported by competent, material, and substantial evidence, and represented the reasonable exercise of discretion granted by law to a ZBA. (Pet., App. at 45a). These determinations were all affirmed by the Michigan Court of Appeals in its May 26, 2000 Opinion. (Pet., App. at 1a). The Michigan Supreme Court denied Application for Leave to Appeal, as it was "not

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[6] Even the Plaintiffs' land use expert, Dennis Larkin, admitted that reducing the area and width requirements of lots in exchange for providing an open space, to separate the development from an adjacent land use ("cluster zoning"), is an acceptable land use practice, especially when one can thereby develop at least the same number of lots on the property as would have been permitted under the existing zoning restrictions. (R II pp. 315-316).

persuaded that the questions presented should be reviewed by this Court." (Pet., App. at 79a). The Michigan Supreme Court then denied the Petitioners' Motion for Reconsideration on July 30, 2001. (Pet., App. at 77a).

REASONS FOR DENYING THE WRIT

The Plaintiffs' Petition for Writ of Certiorari challenges the factual findings made by the trial court and/or the trial court's application of properly stated rules of law to those factual findings. As such, any decision by this Court would be limited to the peculiar facts of this case with little, if any, application to any other cases. This Court, however, has long held that "it does not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), and that its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). Also see *Ponte v. Real*, 471 U.S. 491, 501-02 (1985) (Stevens, J., concurring) and Rule 10(c) of the Rules of the Supreme Court of the United States.

Even if it were the function of this Court's certiorari jurisdiction to correct such factual findings by the trial court, there would be no reason for review in this case because those issues were correctly decided by the trial court, as discussed below.

I. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE TOWNSHIP'S ZONING ORDINANCE DID NOT EFFECTUATE AN UNCONSTITUTIONAL TAKING OF THE PLAINTIFFS' PROPERTY

A. The Agricultural Zoning of the Plaintiffs' Farm

In support of their "taking" claim, the Plaintiffs in their Petition first suggest that there is no legitimate governmental interest behind the residential development restrictions contained in the Township's agricultural zoning of their farm land. Although they recognize that there is a legitimate governmental interest in separating incompatible land uses, they base their entire argument on their claim that there is no incompatibility between intensive agricultural operations, like a turkey farm, and a single-family residential development. (Pet. at 27). The trial court, however, rejected this factual argument by noting that the evidence "very convincingly" points out the incompatibility between these conflicting land uses, and the serious problems that these incompatible land uses would create if adjacent to each other. (Pet., App. at 37a-38a).

This factual determination by the trial court was supported by, among others, Dr. David Skjaerlund who serves as the Executive Director for the Rural Development Council of Michigan, and is an expert who counsels communities on how to address the conflicts that arise between adjacent residential and agricultural land uses. (R IV p. 56). He testified about the enormous incompatibilities and conflicts that would occur between these two adjacent land uses, with each land use having a

negative impact on the other. (R IV pp. 63-71). This incompatibility between adjacent residential and agricultural land uses, and the existence of the governmental interest in addressing those issues, has even been recognized by the Michigan legislature in its adoption of the Michigan Right to Farm Act, MCL 628.471 et seq.

Further, expert testimony at trial confirmed that the restrictions contained in the Township's zoning of the Plaintiffs' property (with and/or without the variance) did indeed help to reduce these conflicts, and thereby served to advance this legitimate governmental interest. See, for example, the expert testimony of Dr. Skjaerlund (R IV p. 72) and the testimony of the professional community land use planner, Paul LeBlanc (R IV pp. 152-155), who testified that the zoning ordinance restrictions, as applied to the Plaintiffs' property, were reasonable in advancing this legitimate governmental interest. Obviously, the fewer number of homes there are next to a turkey farm or other agricultural land use, and/or the greater the buffer space between them, the fewer number of problems, conflicts and complaints will likely occur.

In their Petition, the Plaintiffs also try to make the factual argument that the agricultural zoning of their property constitutes a taking for the reason that it "deprives them of any economically beneficial use of that land." (Pet. at 25). However, the evidence presented during the trial, and the findings of fact made by the trial court, established just the opposite by confirming that their property has substantial value, and can be used for many purposes, under its existing zoning.

First, based on the evidence presented during the trial, the trial court specifically found as a finding of fact that the Plaintiffs' property has "considerable value as farm land," which the court determined to be in the amount of $90,000.[7] (Pet., App. at 39a). This amount did not even include that part of the farm donated to Love, Inc. valued at $20,000, or the parcel on which the two houses and other structures were located, valued at $20,000 exclusive of the value of the structures thereon. If one were to add those values to the $90,000, the total value of the Plaintiffs' AG property would be at least $130,000, which exceeds the Plaintiffs' $128,000 purchase price for the farm.

Second, the trial court found that the Plaintiffs' property has "considerable value" in the amount of $200,000 for rural residential purposes.[8] (Pet., App. at 39a). This $200,000 value also only pertained to the 25.25-acre section of the farm. If one were to add the value of the balance of the farm ($40,000, exclusive of the value of the structures thereon) as noted above, then the total value of

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[7] This conclusion was based in part on the expert testimony of Stan Boekins, a certified real estate appraiser. (R V-A pp. 5-9). It is also supported by the expert testimony of Dr. James Crum, from Michigan State University, who testified that the property is suitable and can be used for a wide variety of agricultural purposes. (R III pp. 630-634, 644). (Pet., App at 39a).

[8] This conclusion was also supported by the expert testimony of Stan Boekins. (R V-A pp. 9-16). It is also supported by the testimony of Tom Olson, of the County Health Dept., who testified that this property would be suitable for on-site private septic systems. (R III pp. 657-662).

the Plaintiffs' farm would be at least $240,000, which would exceed its purchase price of $128,000 by $112,000.

To use their property for such agricultural and/or rural residential uses, the Plaintiffs would not have to incur any infrastructure expenses for building any roads or installing any public water or sewer lines. Consequently, their argument that they "invested $112,032 in infrastructure work and legal fees to create the site condominium" (Pet. at 28) is simply not applicable.[9]

The above agricultural and rural residential uses, and their resulting $90,000 and $200,000 values respectively, are available to the Plaintiffs under the Township's zoning ordinance even without the benefit of the optional variance that was granted to them by the ZBA. Consequently, given these factual determinations made by the trial court, the Township's zoning ordinance, even without the benefit of the ZBA variances, does not effectuate any unconstitutional taking of the Plaintiffs' property.

The Plaintiffs do, however, have the additional alternative of being able to develop their AG property in accordance with the variances granted by the ZBA. With the benefit of these variances, the Plaintiffs could build up to 28 lots on the 25.25-acre section of this property. Although there may be countless ways in which the Plaintiffs could design such a development, the Township Zoning Administrator, Phillip Brummel, produced during

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[9] In addition, most, if not all, of those expenses were for work done for, and needed by, the Plaintiffs' residential development on their adjacent R-1 property as opposed to their AG property, i.e., the roads and the public water and sewer lines therein.

the trial two separate site plans showing how this could be done in conformity with the Township's zoning ordinance as modified by the ZBA variances. (R VI pp. 19-23). Using the same lot values and development cost figures introduced into evidence by the Plaintiffs' own expert (Def. Exh. 50, R VI pp. 2, 2-3), Plaintiffs could make a net profit of $361,616 under one of those site plans and $390,041 under the other.[10] (R VI pp. 264-266). Consequently, the ZBA variance further serves to completely destroy their taking claim.

With or without the ZBA variances, the Plaintiffs' property can be used, and has substantial value, under the Township's zoning ordinance. Consequently, their "taking" claim is completely without merit as having no factual or legal basis.

B. The Buffer Space Condition to the Variance

This is a meaningless issue. It is meaningless because, as noted above, the AG zoning of the Plaintiffs' property does not effectuate any unconstitutional taking, even without the benefit of the conditional variances granted by the ZBA.

In addition to the uses available under the AG zoning, the ZBA granted the Plaintiffs the benefit of an additional option in the form of a conditional variance. In

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[10] The Plaintiffs' argument to the contrary is factually flawed and contrary to the record, including their own expert's figures, partly because they try to include unnecessary development expenses for improvements not required under the zoning ordinance.

exchange for permitting a reduction in the minimum area and width of the lots, and permitting eight more lots than otherwise would have been permitted under the zoning ordinance, the variance required a buffer space to help separate the Plaintiffs' proposed high-density residential development from the adjacent incompatible land use, being the turkey farm. As part of their litigation strategy, the Plaintiffs attempted to attack the validity of this buffer space condition in order to totally eliminate the benefit of this variance option.[11]

This was for the purpose of trying to reduce the economically beneficial use of their property, and thereby enhance their constitutional attack on the Township's zoning of their property. However, this trial strategy failed because, as noted above, the AG zoning of their property is constitutional even without the benefit of this variance. Consequently, this issue has been rendered moot and completely meaningless.

Additionally, the Plaintiffs are simply wrong in arguing that the buffer space condition amounts to an unconstitutional taking. First, the Plaintiffs continue to make the erroneous factual argument that they have no economically beneficial use of this buffer space. Instead, it would have substantial economic value to the Plaintiffs. Under the ZBA variance, they are merely precluded from constructing a structure or road in it. They could use this buffer space for any other purpose permitted under the

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[11] As the buffer space was a condition to, and in exchange for, the benefit of being able to build smaller and 8 more lots, those benefits under the variance would also be eliminated if the buffer space condition were to be eliminated.

zoning ordinance, including using it as a park, recreation area, or otherwise to enhance the quality and value of their residential development and lots therein. In fact, the very existence of an open space in and of itself enhances the value of a residential development. Alternatively, the property within the buffer space could be used to be included within, and thereby increase the size of, one or more of the adjacent lots, which would increase the value of those resulting larger lots within their development. Further, the ZBA included a sunset provision on this buffer space requirement, instead of making it a permanent condition as is customary. Therefore, the Plaintiffs will be able to develop this buffer space when the incompatibility caused by the adjacent turkey farm operation ceases to exist. This also greatly adds to its economic value. Consequently, the trial court properly rejected this attempted factual argument by the Plaintiffs. (Pet., App. at 36a-37a).

Second, the Plaintiffs make the erroneous factual argument that this buffer space does not satisfy the "rough proportionality" test set forth in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). After considering all of the evidence produced at the trial, the trial court rejected that factual argument and found that the size and configuration of this buffer space was "reasonable." (Pet., App. at 38a).

Third, in *City of Monterey v. Delmonte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-703, 733 (1999), this Court confirmed that the "rough proportionality" test in *Dolan* does not even apply to regulations which simply regulate the scope of development on one's property, i.e., the denial of development. It only applies to those limited situations in which the condition requires the actual

"dedication of property to public use," which is not the case here. Also see *Bevan v. Brandon Township*, 438 Mich. 385, 398 n.12 (1991).

Fourth, the Plaintiffs' argument that the buffer space condition amounts to unconstitutional nuisance abatement is both factually and legally wrong. As explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), consideration of a state's nuisance law only comes into play to legitimize a zoning ordinance when it has the effect of prohibiting *all* economically beneficial uses of the Plaintiffs' contiguous land, i.e., a "total taking." This nuisance law concept, however, simply has no application to a situation, such as the present case, where a zoning ordinance does not effectuate a "total taking" of the Plaintiffs' contiguous property. In fact, the *Lucas* court rejected the concept of analyzing the validity of zoning restrictions by looking at any harmful or obnoxious use of the regulated property. Instead, the proper analysis is to simply determine whether the regulation advances a legitimate governmental interest. *Lucas*, at 1022-1024. In restricting the use of property it is not necessary to declare that use to be a nuisance. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926). It is sufficient to merely determine that the restricted use is simply the "right thing in the wrong place," i.e., "like a pig in the parlor instead of the barnyard." *Euclid*, at 388.

Further, Plaintiffs conveniently overlook the fact that the buffer space will also help to abate the various nuisances and negative impacts their proposed development would have on the people who reside therein and on the adjacent land use, and not just the impact the turkey farm would have on their subsequent development. As Paul

LeBlanc, the expert community use planner, testified, the structures in the development themselves may not be a nuisance, but people who live in them cause various problems to occur for which zoning laws are designed to address. (R V pp. 183-184). This is why open spaces, buffers, and set backs are customarily required. Indeed, the use of such open spaces has long been recognized as a valid and legitimate zoning tool to help separate adjacent land uses. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

Fifth, the Plaintiffs' "taking" argument in reference to this buffer space is fatally flawed from the get-go. In making their argument, they cut out, extract and analyze only that part of the property located within this buffer space without regard to the balance of their contiguous property. That approach violates one of the fundamental principles of taking jurisprudence known as the "non-segmentation" principle. Under this rule of law, all of the Plaintiffs' contiguous property is to be considered as a whole when deciding whether a regulatory taking has occurred. The court cannot divide contiguous property into discrete segments and then analyze whether there has been a regulatory taking in reference to each segment. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-131 (1978); and *K&K Construction, Inc. v. Department of Natural Resources*, 456 Mich. 570, 578-539 (1998). If this were not the case, then all open spaces, buffers and set backs customarily used throughout the nation to help separate adjacent land uses would be put into jeopardy. This court, however, has long recognized such open spaces to be lawful and valid tools used in the administration of zoning ordinances. *Agins v. City of Tiburon, supra.*

II. THE TRIAL COURT DID NOT MAKE ANY ERRONEOUS FACTUAL FINDINGS OR MISAPPLY PROPERLY STATED RULES OF LAW WHEN IT DETERMINED THAT THE PLAINTIFFS WERE NOT DENIED PROCEDURAL DUE PROCESS.

This is also a meaningless issue. In addition, the Plaintiffs base their procedural due process argument upon their erroneous characterization of the facts.

This is a meaningless issue in this case because of the way the Plaintiffs have postured this case and formed their requested relief. In their appeal of the ZBA variance decision to the trial court,[12] the Plaintiffs did not complain that the ZBA denied their request for a variance (which it only partially granted), or even complain that the ZBA should have given them more relief than it did. Instead, their unique "complaint" in this case was that the ZBA granted them some relief. Instead of asking the trial court to give them more relief, the Plaintiffs in this case attempted to have the court declare the entire variance null and void, and thereby eliminate the benefit of their variance option in total.

In addition to the multitude of permitted agricultural and other uses, the zoning ordinance permits the Plaintiffs to develop their property up to 20 one-acre lots with

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[12] One may appeal a final decision by a ZBA to the Circuit Court as a matter of right under MCL 125.293a to insure that the decision (a) complies with the constitution and laws of the state, (b) is based upon proper procedure, (c) is supported by competent, material, and substantial evidence, and (d) represents the reasonable exercise of discretion granted by law to the ZBA.

150-foot frontages. In responding to the Plaintiffs' variance application, the ZBA did not take any of these permitted uses or rights away from the Plaintiffs – NONE. Instead, by giving the Plaintiffs certain area, frontage and density variances, the ZBA only served to increase their options in developing this property up to 28 lots. The Plaintiffs recognized that this variance relief, which substantially increased their economically beneficial use of their property, greatly jeopardized their "as applied" constitutional attack on the zoning ordinance. So as trial strategy, they attempted to eliminate and destroy these variances in order to enhance their "as applied" constitutional attack on the zoning ordinance. If they had been successful, they were then hoping to be able to convince the trial court to take the next giant step of permitting them to continue with their original proposed higher density development without regard to the adjacent, incompatible and conflicting land use. This attempt at self creating their own hardship, in order to have a better shot at achieving their desired trial results, proved to be a futile effort because, given the determinations by the trial court as noted above, the zoning of the Plaintiffs' property is constitutional even without the benefit of the ZBA variances. As the zoning ordinance is constitutional with *or* without the benefit of this variance, this procedural due process issue has been rendered moot and completely meaningless in this case.[13]

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[13] The Plaintiffs are not required to use this variance relief. The option to use it or not is theirs. No court has to declare it void in order for them to elect not to use it.

Further, procedural due process is a "flexible concept" that varies depending on the nature of the proceedings and the interest affected. Generally, due process requires that the parties receive notice of the proceedings, an opportunity to be heard, and an impartial decision maker. The opportunity to be heard does not require a "full trial like proceeding". *Convalescent Center v. Blue Cross*, 414 Mich. 247, 270-271 (1982). Also see *Brody v. City of Mason*, 250 F.3d 432 (6th Cir. 2001). Again, in this case, the Plaintiffs' unique "complaint" is that the ZBA granted them some beneficial relief, as to opposed to complaining that the ZBA should have given them more relief. In rendering their decision, the ZBA did not take any prior rights or benefits from the Plaintiffs, who could still choose to develop the property as zoned without the benefit of the variance. In other words, the "interest affected," as identified by the Plaintiffs, was in the form of having received a benefit as opposed to losing any prior rights. Consequently, if the Plaintiffs have *any* procedural due process rights here, then the applicable standards of this flexible concept under the Plaintiffs' unique posture in this case would be at best extremely minimal.

In any event, procedural due process standards were satisfied in this case. The Plaintiffs' arguments to the contrary are based upon their erroneous characterization of the facts. They were indeed given a full opportunity to be heard, and were not denied the right to cross-examine anyone, before the ZBA rendered its decision on the variances.

The Plaintiffs were first given the opportunity to be heard by being entitled to provide any information they wanted along with their variance application. (Record

Exhs. 1 & 2).[14] Then, in addition to receiving notice of the proceedings, they were indeed present with legal counsel at each of the two public hearings held on their application. At the first hearing on January 9, 1997, the Plaintiffs and their attorney took full advantage of their opportunity to be heard by presenting all of their facts and arguments in support of their application. (Pet., App. at 200a-201a).

It must be remembered that by the time of this hearing, the Plaintiffs had been through a rezoning process with the Planning Commission and the Township Board, then through a highly contested referendum, and had been involved in this litigation for approximately one and a half years. Consequently, by the time of this hearing, they were well aware of all of the arguments raised in opposition to their application, including the number of lots and the size of the buffer space. Those arguments were again voiced at this first hearing by residents who spoke in opposition to the variance application. (Pet., App. 201a). Therefore, the Plaintiffs were fully aware of all those issues and had the full opportunity to respond to them.

At the end of the January 9, 1997, hearing, the ZBA voted to "table" and "reconvene" the hearing so that the Township's Zoning Administrator would have the opportunity to submit into the evidentiary record a written

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[14] "Record Exh" are references to the exhibits that constituted to record of the ZBA submitted to the trial court for their appeal of the ZBA decision, and are identified with the corresponding exhibit numbers in the "Stipulation to the Record of the Zoning Board of Appeal" filed with the trial court.

report for the ZBA to consider before rendering a decision. (Pet., App. at 49a, 52a, 53a, 74a & 202a). This was done with the full knowledge of the Plaintiffs in their presence without any objections being voiced by them. (Pet., App. at 198a-202a).

As requested by the ZBA, the Township Zoning Administrator, Phillip Brummel, prepared a "Staff Report and Recommendations" dated January 31, 1997, and distributed it to the ZBA members that day. (Pet., App. at 49a). Before commencing with the continued hearing on February 3, 1997, everyone present at the meeting, including the Plaintiffs and their attorney, were first given a copy of the Staff Report.[15] [16] (Pet., App. at 49a). Phillip Brummel then presented his Staff Report and responded to several questions from the Board. Again, this was all done without any objections from the Plaintiffs. The Plaintiffs' assertion that their counsel "tried to object" (Pet. at 11) to the presentation of Staff Report is a disputed issue of fact and not supported by the record

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[15] Although the Plaintiffs were fully aware that the Staff Report was going to be presented at this hearing, they chose not to request or obtain a copy of it in advance of the hearing. In any event, they did receive a copy of it at the beginning of this hearing when it was submitted to the Board for consideration.

[16] Although the record does not specifically identify when that part of the public hearing ("tabled" on Jan. 9, 1997, to be "continued" and "reconvene" on Feb. 3, 1997 [Pet., App. at 49a & 202a]), for the collection of evidence was closed, it would have necessarily been some time after the submission of the Staff Report and just before the motion was made to adopt the Resolution, as it was always the clear intent and understanding that the Staff Report would be received into the evidentiary record for consideration by the ZBA.

below. (Pet., App. at 51a). In addition, and more importantly, the Plaintiffs never did request any opportunity to ask Mr. Brummel any questions, to cross-examine him, or to in any other way respond to his presentation.[17] (Pet., App. at 51a).

A motion was then made to approve a proposed resolution in reference to their variance decision. This motion passed by unanimous vote. Again, this was all done without any objections or concerns being expressed by the Plaintiffs who were present with legal counsel. (Pet., App. at 50a). It was only *after* this resolution had already been adopted that the Plaintiffs requested permission to make a statement. This request was simply to "make a statement relative to the Board's action." (Pet., App. at 50a). It was not a request for an opportunity to ask the Zoning Administrator any questions, to cross-examine him, or in any other way respond to his Staff Report.

As the decision had already been rendered, the chairman advised them to put any statement they may have in writing and send it to the Board. (Pet., App. at 50a). In spite of this invitation, the Plaintiffs never took advantage of that additional opportunity to be heard.

Further, the Plaintiffs failed to take advantage of the opportunity provided to them under Section 28.06 of the Township Zoning Ordinance (Pet., App. at 187a) to file a

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[17] As the Plaintiffs were the applicants and not just members of the general public, the ZBA would have given them this opportunity. Further, the Plaintiffs have never identified what they would have offered, if anything. Therefore, they cannot demonstrate any harmful or reversible error.

request for reconsideration of the Board's decision. (See Stipulation to the Record of the Zoning Board of Appeals.) This right to file a request for reconsideration included the right to submit any additional evidence for the Board to consider in rendering its final decision. As recognized by the trial court, the Plaintiffs simply, knowingly and voluntarily elected to waive and relinquish this further opportunity to be heard. By not taking advantage of this right to request reconsideration, the Plaintiffs are precluded from claiming that they have been prejudiced by any alleged wrongful failure to give them such an opportunity. *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989). Also see *Brody v. City of Mason, supra* at 438.

A party may not attempt to "build error" into a proceeding by idly sitting by in the face of actual or perceived irregularities, hoping for a favorable decision, then urge those un-objected-to irregularities as a basis of review if the decision goes against them. *Sampeer v. Boschma*, 369 Mich. 261, 265-266; 119 NW2d 607 (1963). Such attempts to manufacture error have repeatedly been held not to preserve the error but to waive it. *Id.* Plaintiffs, by failing to object in any way to the procedures afforded them by the ZBA prior to its decision, have likewise waived any right to complain about those procedures on appeal.

Petitioners acknowledge that Michigan law recognizes the right to cross-examine witnesses during ZBA hearings. (Pet. at 15-16). The existence of that right or legal principle is not at issue in this case. Instead, the Plaintiffs simply assert that this legal principle was not applied to the unique facts involved in this case, which is

factually disputed by the parties. In any event, this issue has been rendered moot and meaningless in light of the trial court's factual findings supporting the conclusion that the zoning ordinance as applied to the Plaintiffs' property is constitutional even without the benefit of this variance granted by the ZBA. Its validity therefore has no bearing on the results in this case. Again, the Plaintiffs are free to use or not use the variance as they choose. Consequently, even if this court were inclined to consider and further define minimum procedural due process standards applicable to a variance hearing before a township zoning board of appeals, this case would serve as an extremely poor vehicle to bring those issues before this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectively requests that the Petition for Writ of Certiorari be denied.

Dated: February 1, 2002

Respectfully submitted,

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